STATE OF MICHIGAN

COURT OF APPEALS

ARCHIE A. VAN ELSLANDER TRUST, by GARY A. VAN ELSLANDER, Trustee,

Plaintiff-Counterdefendant-Appellant,

v

AVF PARENT, LLC,

Defendant-Appellee,

and

BROADSTONE AVF MICHIGAN, LLC,

Defendant-Counterplaintiff-Appellee.

UNPUBLISHED
June 25, 2020

No. 349052
Oakland Circuit Court
LC No. 2018-164801-CB

Before: TUKEL, P.J., and SERVITTO and BECKERING, JJ.

PER CURIAM.

In this property dispute, plaintiff Archie A. Van Elslander Trust, by trustee Gary A. Van Elslander, seeks reformation of two deeds. The trial court granted summary disposition to defendant AVF Parent, LLC (AVF) under MCR 2.116(C)(10). Thereafter, the court issued an order dismissing the counterclaim of defendant-counterplaintiff Broadstone AVF Michigan, LLC (Broadstone). Plaintiff appeals as of right. For the reasons stated below, we affirm in part, reverse in part, and remand for further proceedings.

I. RELEVANT FACTS AND PROCEEDINGS

Art Van Furniture, Inc. (Art Van) is a Midwestern furniture and mattress retailer. According to the complaint, "[u]ntil recently, Art Van operated its business and provided products and services to its customers in conjunction with several related entities ('AV Business')." Art Van and other related entities, including plaintiff, owned the real estate related to AV Business. This case involves the transfer of five parcels of property in Novi, Michigan that plaintiff owned (the Novi Property). The Novi Property was transferred pursuant to a multiparty transaction

governed by an equity purchase agreement ("EPA") in which AVF agreed to purchase the equity and assets of the Art Van Furniture business along with specified real property related to the business. AVF and plaintiff were parties to the EPA, and Broadstone was AVF's designee for and the ultimate purchaser of the Novi Property.

Parcels 1 through 3 of the Novi Property totaled 6.7 acres, had the street address of 27775 Novi Road, Novi, Michigan, 48377, and comprised the Novi Art Van Showroom and parking lot. Behind and separate from parcels 1 through 3 were parcels 4 and 5 of the Novi Property, which constituted 1.41 acres, were not used in conjunction with the operations of the Novi Art Van Showroom, and did not have a street address. According to plaintiff, the parties intended that plaintiff would sell only parcels 1 through 3 because they were used in relation to the Art Van business. The property to be sold was appraised, and the appraisal only included parcels 1 through 3, showing a value of $14.9 million for the 6.7 acres that included the building and parking lot. This information was included in the marketing materials plaintiff provided to potential buyers.

The parties agree that parcels 4 and 5 were not "Excluded Real Estate" as defined in the EPA and were transferred under the agreement. However, plaintiff contends that their inclusion was a mistake. According to plaintiff, the title company, working exclusively with AVF, ordered surveys and title work that erroneously included parcels 4 and 5; that mistake was not caught and so it continued throughout the transaction, leading to plaintiff's inadvertent transfer of parcels 4 and 5. In March 2018, this lawsuit was filed against defendants seeking reformation of the deeds that plaintiff executed for the Novi Property on the basis of mutual mistake. Unilateral mistake was alleged in the alternative. Under the terms of the equity purchase agreement, Delaware law controlled the case.

AVF moved for summary disposition under MCR 2.116(C)(8) (failure to state a claim) and MCR 2.116(C)(10) (no genuine issue of material fact), contending that AVF and Broadstone were not mistaken and that they had intended to and did purchase all five parcels. AVF further argued that plaintiff could not show that the covenant and quitclaim deeds were contrary to the equity purchase agreement, which was fatal to plaintiff's claim, and that even if plaintiff could establish that the covenant and quitclaim deeds were contrary to the equity purchase agreement, plaintiff's "repeated and unreasonable failure to discover its mistake constitutes a failure to abide by appropriate standards of good faith and fair dealing." Plaintiff responded that the deeds did not express the intention and agreement of the parties because only real property used by Art Van was intended to be conveyed in the transaction. Plaintiff attached various photographs of the parcels and marketing materials dated October 2016 that related to the Novi Property.

The trial court held a hearing on AVF's motion for summary disposition. After brief argument by the parties, the trial court concluded that plaintiff had stated a claim upon which relief could be granted for reformation on the basis of mutual or unilateral mistake under Delaware law and denied summary disposition under (C)(8) on that basis. The trial court then considered AVF's argument under (C)(10) that plaintiff had failed to establish mutual or unilateral mistake and that plaintiff's own negligence barred the relief plaintiff sought. The trial court concluded that although plaintiff had argued that a question of fact existed regarding its fault, plaintiff had failed to address the three elements it had to satisfy and had attached no evidence in support of its position; rather, plaintiff relied solely on the allegations contained in its amended complaint, along with aerial photographs of the disputed parcels and copies of marketing materials for the Novi Art Van

Showroom, which were insufficient to raise a genuine issue of material fact. Accordingly, the trial court granted summary disposition under (C)(10) and entered an order dismissing plaintiff's claim but noting that Broadstone's countercomplaint remained pending.

Broadstone moved for entry of dismissal of its countercomplaint without prejudice and, receiving no objection from plaintiff, the trial court granted the motion and issued a final order closing the case. Plaintiff filed a motion for reconsideration alleging, among other things, that summary disposition under (C)(10) was premature because discovery was not closed and AVF had failed to meet its initial burden to support its position that plaintiff had failed to act in good faith. The trial court denied the motion, concluding that plaintiff failed to demonstrate palpable error. Plaintiff now appeals.

II. DISCUSSION

A. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision to grant summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). Any evidence is viewed in the light most favorable to the nonmoving party. *Moraccini v City of Sterling Heights*, 296 Mich App 387, 391; 822 NW2d 799 (2012). Summary disposition under MCR 2.116(C)(10) is appropriate if there is no genuine issue of material fact except about the amount of damages, and the moving party is entitled to judgment as a matter of law. *Royal Prop Group, LLC v Prime Ins Syndicate, Inc*, 267 Mich App 708, 713; 706 NW2d 426 (2005). A genuine issue of material fact exists if, giving the benefit of reasonable doubt to the nonmoving party, the record leaves open an issue on which reasonable minds could differ. *Id.*

B. MCR 2.116(C)(10)

Plaintiff asserts that the trial court erred by granting AVF's motion for summary disposition pursuant to MCR 2.116(C)(10). Plaintiff contends that AVF failed to meet its burden to show that there was no genuine issue of material fact as to its affirmative defense. Plaintiff further contends that even if AVF had met its burden, proper analysis of the present case under the standards set forth in *Scion Breckinridge Managing Member, LLC v ASB Allegiance Real Estate Fund*, 68 A3d 665, 676-677 (Del, 2013), demonstrates that there remain questions of fact as to whether plaintiff's alleged negligence was so extreme as to bar reformation. We agree.

Pursuant to the choice-of-law provision in the equity purchase agreement, Delaware law controls whether plaintiff properly alleged a claim for deed reformation on the basis of unilateral or mutual mistake and whether AVF established its affirmative defense that plaintiff's negligence barred reformation. Under Delaware law,

> [t]here are two doctrines that allow reformation. The first is the doctrine of mutual mistake. In such a case, the plaintiff must show that both parties were mistaken as to a material portion of the written agreement. The second is the doctrine of unilateral mistake. The party asserting this doctrine must show that it was mistaken and that the other party knew of the mistake but remained silent. Regardless of which doctrine is used, the plaintiff must show by clear and

> convincing evidence that the parties came to a specific prior understanding that differed materially from the written agreement. [*Cerberus Int'l, Ltd v Apollo Mgt, LP*, 794 A2d 1141, 1151-1152 (Del, 2002).]

"Reformation is not precluded by the mere fact that the party who seeks it failed to exercise reasonable care in reading the writing[.]" Restatement (Second) of Contracts § 155, cmt a (1981). As the Delaware Supreme Court has noted, "[a]ny mistake claim by definition involves a party who has not read, or thought about, the provisions in a contract carefully enough." *Cerberus*, 794 A3d at 1154. Nevertheless, in extreme cases, negligence will bar reformation, and the Delaware Court has expressly adopted the following standard from the Restatement (Second) of Contracts, § 157:

> [F]or purposes of a reformation claim: "[a] mistaken party's fault in failing to know or discover the facts before making the contract" does not bar a reformation claim "unless his fault amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing." To the extent existing Delaware case law is inconsistent with this standard, we expressly overrule it. [*Scion*, 68 A3d at 676-677 (Del, 2013).]

Scion illustrates the Delaware court's application of the Restatement standard. The pertinent question in *Scion* was whether the plaintiff, ASB Allegiance Real Estate Fund ("ASB") was entitled to reformation of three joint-venture agreements entered into with the defendant, Scion Breckinridge Managing Member, LLC ("Scion").[1] ASB is an investment advisor for pension funds, and "[b]etween January 2007 and January 2008, ASB-advised pension funds entered into five joint ventures for the ownership, operation, and development of student housing projects." *Id*. at 669. Although ASB's president, Robert Bellinger, did not personally negotiate the ventures, he "actively oversaw the negotiations and personally approved each venture." *Id*. The court explained the basic framework for a real estate joint venture project as follows:

> [A] promoter provides the bulk of the capital and a sponsor arranges the deal and manages the property. ASB served as the promoter in each of the five ASB–Scion joint ventures, providing at least 99% of the capital and retaining at least 99% of the equity. Scion served as the sponsor and invested no more than 1% of the capital. Scion earned a management fee for overseeing the project's day-to-day operations, as well as a leasing fee and an acquisition fee. Scion primarily earned its compensation, however, through an incentive payment known as a "promote."
>
> Generally, a promote is triggered once the project generates a specified preferred return on the invested capital. Once the project achieves the specified preferred return, the promote rewards the sponsor with a greater proportion of the

[1] Captions for the opinions of the Delaware Supreme Court name the party-appellant first, regardless of whether that party was the plaintiff or the defendant in the lower court proceedings. Thus, in the case of *Scion*, Scion is the "Defendant below Appellant" and ASB the "Plaintiff below Appellee."

> project's profits. Real estate professionals commonly discuss promotes using industry shorthand, in which they describe the economics as "an X over a Y." For example, the phrase "20% over an 8%" means the sponsor would receive 20% of incremental profits after the project generated an 8% preferred return. [*Id*. at 670.]

ASB used the law firm, DLA Piper, LLC, as outside counsel, and DLA Piper partner Barbara Trachtenberg drafted and negotiated the parties' agreement for the first joint venture ("the first agreement"). *Id*. The first agreement incorporated the parties' agreed-upon promote and preferred return terms in a "waterfall" provision. The effect of the provision was that "the parties would receive distributions in proportion to their respective percentage equity investments, approximately 99% for ASB and 1% for Scion," until each party received an amount equal to the preferred 8% return on their respective investment and recovered its initial capital investment. *Id*. at 671. Only after ASB had recovered its initial capital investment "would Scion receive a promote payment equal to 20% of the excess profits, with ASB and Scion splitting the remaining 80% according to their 99:1 equity ratio." *Id*. at 671. The record established that Bellinger read the first agreement in its entirety and was familiar with its terms. See *id*. at 677-678. Subsequently, Trachtenberg handed over most of the drafting responsibilities to Cara Nelson, a junior associate at DLA Piper with only a few months' experience working on real estate joint venture deals. *Id*. at 670.

The first agreement served as the template for the agreement for the second joint venture ("the second agreement"). But between the second agreement and drafting of the agreement for the third joint venture project ("the third agreement"), Scion co-founder Rob Bronstein and ASB president Bellinger negotiated a change in terms, reaching an agreement in May 2007 that resulted in a two-tiered promote structure that would allow Scion to earn more money if it increased annual profits through successful property management. *Id*. at 671. According to the May 2007 terms, after annual returns had reached the initial preferred return amount and the parties had recovered their capital, Scion would receive 20% of the profits and split the remaining 80% of the profits with ASB according to their equity ratio. Should the annual return reach a specified higher percentage, Scion would get 35% of the profits and split the remaining 65% of the profits with ASB according to their equity ratio. *Id*.

DLA Piper attorney Nelson used the second agreement as the template for the third agreement and revised it in accordance with her understanding of the terms of the May 2007 agreement. But in drafting the third agreement, Nelson placed the first-tier promote after the first preferred return instead of after both parties recovered their capital investment. The economic effect of this reversal was that after the parties reached their first preferred return, Scion received 20% of every dollar of ASB's initial investment. Trachtenberg testified that she could not remember whether she read the drafts of the third agreement before Nelson circulated them, but surmised that if she had, she had not focused on the waterfall provision because the error was egregious and she would have noticed it immediately. See *id*. Bellinger testified that he reviewed parts of the third agreement, but admitted that he failed to read it carefully, and "[t]he ASB Investment Committee approved the deal based on an internal memorandum describing the

Waterfall as consistent with the May 2007 Terms."[2] *Id*. Nelson drafted agreements for the fourth and fifth projects ("the fourth agreement" and "the fifth agreement" respectively) by electronically copying the third agreement and making minor, deal-specific changes. Bellinger and Trachtenberg testified that they did not read the agreements carefully, and the ASB Investment Committee approved the deals based on internal memoranda. *Id*. at 673-674. Both agreements had waterfall provisions that placed the first-tier promote ahead of the return of capital investment. *Id*.

The error came to light when Scion exercised its put rights in the fourth and fifth agreements, demanding put purchase prices that included promote payments totaling $4.1 million. Thus, as a result of the drafting error, Scion claimed a profit of more than $2.8 million (223%) on their initial capital investments before ASB had recovered its capital investment. See *id*. at 674-675. After discovering the drafting error in the third through fifth agreements, ASB filed suit in Delaware's court of chancery seeking reformation of the three improperly drafted agreements.

The action proceeded to trial. The chancery court found that the first agreement served as the basis for the disputed agreements and that Bellinger had read the first agreement completely, after which he relied on his attorneys and ASB's liaison with Scion to "advise him about any changes, brief him on new terms, and provide him with any portions that he needed to read." *Id* at 675-676. The chancery court concluded, therefore, that "Bellinger adequately and properly oversaw the negotiation process and was informed about the terms of the joint venture agreements as negotiated by the parties." The chancery court ruled that "even assuming Bellinger read none of the Disputed Agreements, but rather relied on his employees and advisors to inform him of any changes, his failure to read would not bar a reformation claim." *Id*. at 676. Accordingly, the court reformed the disputed agreements in ASB's favor.

Scion appealed in the Delaware Supreme Court, arguing that Delaware law did not support the chancery court's ruling. The Supreme Court took the opportunity to clarify Delaware law regarding when a party's conduct is so negligent as to bar reformation by adopting Restatement, § 157. Applying the restatement standard tot the facts before it, the Court explained:

> [T]he Restatement indicates that parties' conduct does not amount to a failure to act in good faith and in accordance with reasonable standards of fair dealing where (1) one party's lawyer erroneously reduced the parties' actual agreement to writing, (2) neither party read the writing before signing it, and (3) the error would have been obvious had the parties read the writing. See Restatement (Second) of Contracts §§ 155 cmt a, illus 1, 157 cmt b, illus 3 (1981). [*Scion*, 68 A3d at 678 n 41.]

ASB's attorney erroneously reduced the terms of the parties' May 2007 agreement to writing in the third agreement and perpetuated the error in the fourth and fifth agreements, and her error was obvious to Trachtenberg and to Bellinger upon reading the disputed agreements.

[2] Eric Bronstein, the other co-founder of Scion, read the draft, realized the advantage the placement of the terms gave Scion, and said nothing. *Id*. at 672. This was the basis of the chancery court's finding of unilateral mistake. See *id*. at 678.

Although Bellinger admitted that he did not carefully read the third, fourth, or fifth agreements before executing them, the Supreme Court approved of the chancery court's conclusion that Delaware law does not "require that a senior decision-maker like Bellinger read every word of every agreement." *Id*. at 678 (quotation marks omitted). Thus, the Court held "that even assuming Bellinger did not read the Disputed Agreements, he acted in good faith and in accordance with reasonable standards of fair dealing." *Id*. at 677.

Turning to the case at bar, plaintiff contends that AVF failed to meet its initial burden to show that there are no genuine issues of material fact as to its affirmative defense that plaintiff's own negligence bars its claim of reformation. We agree. AVF points to a multitude of title-related documents that attorneys for plaintiff requested, reviewed, revised, or approved. These explicitly included parcels 4 and 5 as part of the Novi property. From these, AVF infers that the parties intended parcels 4 and 5 to be included on the disputed deeds, or if the parties did not so intend, then the failure of plaintiff's attorneys to detect and correct the alleged error before incorporating it into the deeds constitutes a failure to act in accordance with reasonable standards of fair dealing. However, this argument is similar to saying that since the DLA Piper attorney who incorporated her erroneous understanding of the terms of the May 2007 agreement between ASB and Scion into the third agreement, and then perpetuated the error by incorporating it into the fourth and fifth agreements, that either the parties intended the effects of the error, or ASB's failure to catch and correct the error was negligence of such magnitude as to bar reformation of the disputed agreements. Here, as in *Scion*, AVF cannot point to the perpetuation of an alleged mistake as evidence of intent or, without more, of negligence on the part of plaintiff so extreme as to bar reformation. The *Scion* Court looked to facts and circumstances of Bellinger's conduct in determining whether failure to catch and correct the attorney's error met the Restatement's standard of negligence that amounted to a "failure to act in good faith in accordance with reasonable standards of fair dealing." Viewing the evidence in the light most favorable to plaintiff, AVF presented ample evidence of the actions of plaintiff's attorneys, but none of plaintiff's conduct. Absent such evidence, AVF has not met its initial burden to show that no genuine issue of material fact exists that plaintiff's conduct was so extreme as to bar reformation.

Even if we assumed for the sake of argument that AVF had met its initial burden, we also agree with plaintiff that the application of the Restatement standard, as illustrated in *Scion*, weighs against granting AVF's motion for summary disposition on the basis of its affirmative defense. The *Scion* Court's application of the Restatement's standard indicated that the degree of negligence required to bar reformation is not shown where "(1) one party's lawyer erroneously reduced the parties' actual agreement to writing, (2) neither party read the writing before signing it, and (3) the error would have been obvious had the parties read the writing." *Scion*, 68 A3d at 678 n 41.

Applying these criteria to the facts of the present case, it is undisputed that, just as ASB's attorney drafted the disputed agreements for which ASB sought reformation, the present plaintiff's attorneys drafted the disputed deeds for which plaintiff now seeks reformation. However, AVF argues that plaintiff has presented no evidence of a prior agreement that excluded parcels 4 and 5 from transfer and, therefore, that the text of the disputed deeds accurately represents the parties' "actual agreement." Although AVF raised the issue of whether plaintiff presented evidence of a specific prior agreement in its summary disposition brief, the trial court did not rule on it. Reviewing the record de novo, we are convinced that there is evidence from which a rational trier

of fact could infer that plaintiff could prove the existence of a specific prior agreement by clear and convincing evidence. See *Cerberus*, 794 A2d at 1149.

Plaintiff attached to its response to AVF's motion for summary disposition pages from a marketing brochure sent to potential buyers that described the Novi property as located at 27775 Novi Road, Novi, Michigan, 48377, and consisting of 6.7 acres. AVF has not disputed that this described parcels 1 through 3. Viewing this evidence in the light most favorable to plaintiff, the brochure indicates plaintiff's intent to sell Novi property consisting only of parcels 1 through 3. In addition, various provisions of the EPA also suggest that plaintiff intended to sell, and AVF to purchase, the Novi property presented in the marketing brochure, i.e., parcels 1 through 3.

According to the EPA, one of plaintiff's responsibilities at closing was to deliver to the buyer deeds conveying the "specified owned real property." EPA § 6.1(d)(*i*). Section 2.1(b) of the EPA defines "specified owned real property" as "Real Property owned by the Real Property Transferors." Elsewhere, the EPA defines "real property" as "the Owned Real Property and the Leased Real Property." EPA, p 15. Neither party claims that the Novi property falls into the category of "leased real property," or that parcels 4 and 5 of that property are on the schedule that lists leased real property. Therefore, it is reasonable to assume that the Novi property falls into the category of "owned real property." "Owned Real Property" is listed on Schedule 4.7(a), which "sets forth the street address of each parcel of Owned Real Property and the owner thereof." EPA § 4.7(a). AVF does not dispute that parcels 4 and 5 do not have a street address and are not listed on Schedule 4.7(a).[3] If Schedule 4.7(a) lists the owned real property to be transferred, and parcels 4 and 5 are not included on this list, just as they are not included in plaintiff's marketing materials, then, viewing the evidence in the light most favorable to plaintiff, a rational trier of fact could infer that plaintiff has shown clear and convincing evidence of a prior agreement that did not include the transfer of parcels 4 and 5. Accordingly, by including parcels 4 and 5 in the disputed deeds, plaintiff's attorneys "erroneously reduced the parties' actual agreement to writing." *Scion*, 68 A3d at 678 n 41.

With regard to the second criterion, the record is silent as to whether plaintiff read the deeds in their entirety before their delivery. The Delaware Supreme Court has noted that "although [a plaintiff's] failure to read the contract is not itself dispositive of [the plaintiff's] reformation claim, that failure to read nevertheless substantially compromises the claim that the contract as written differed from what the parties had agreed upon." *Parke v Bancorp Inc v 659 Chestnut LLC*, 217 A3d 701 (Del, 2019). AVF contends that failure to notice that parcels 4 and 5 "were included in every single relevant transactional document" makes plaintiff's claim of a mistake unlikely and "substantially compromises" its claim that the disputed deeds are different from what the parties had agreed upon. However, Schedule 4.7(a) appears to us to be a "relevant transactional document" of particular significance, since it lists the "owned real property" subject to transfer

[3] Instead, AVF points to EPA § 5.19(b), which states that the buyer had arranged a land survey of the "owned real property," and then to the survey itself, which includes parcels 4 and 5 in its survey of the Novi property. However, this is the alleged mistake that plaintiff contends resulted in the erroneous drafting of the disputed deeds.

and for which title work is required, and AVF does not dispute that parcels 4 and 5 were not on that schedule.

Further, even if we assume with AVF that plaintiff did not read the deeds before they were delivered, whether that omission signifies a "failure to act in good faith and in accordance with reasonable standards of fair dealing" arguably depends on the circumstances. As previously indicated, the Delaware Supreme Court held in *Scion* that, even if Bellinger did not read the disputed agreements, "he acted in good faith and in accordance with reasonable standards of fair dealing." *Scion*, 68 A3d at 677. That holding rested in part on the record support for the chancery court's factual finding that Bellinger had read the first agreement in its entirety, that the first agreement was the basis of the disputed agreements, and that he had relied on his advisors to inform him of any matters relevant to the latter agreements. The Court did not address "whether Bellinger would have satisfied the Restatement standard if he had failed to read the first agreement." *Id*. at 678 n 41. The *Scion* court's ruling signifies that whether conduct violates good faith and reasonable standards of fair dealing depends on an analysis of the factual context of the conduct. Underlying the case at bar is a complex transaction, conducted over the course of only six months, involving hundreds of millions of dollars in assets at 41 separate properties and who knows how many lawyers, and resulting in a written agreement (the EPA) in excess of 100 pages, not counting attached documents. It seems to us that rational jurors could disagree regarding whether plaintiff's reliance on its advisors and presumed failure to read the disputed deeds was, under the circumstances, negligence of such a magnitude as to constitute a "failure to act in good faith or in accordance with reasonable standards of fair dealing."

Regarding the third criterion, it seems reasonable to assume that the alleged error would have been obvious had plaintiff read the disputed deeds. Viewing the evidence in the light most favorable to plaintiff, its marketing materials indicated that they were offering to sell the three parcels at 27775 Novi Road, this was the property listed on the schedule of owned real property, and that the three parcels were the only property that should have been conveyed by the disputed deeds, but for their attorneys' alleged erroneous reduction of the parties' agreement to writing. To the extent that AVF argues that there was no mistake, that is a matter to be resolved through further proceedings.

We conclude that the trial court erred in granting AVF's motion for summary disposition pursuant to MCR 2.116(C)(10). Because AVF failed to present any evidence of plaintiff's conduct to establish that there were no genuine issues of material fact that plaintiff's negligence barred reformation, AVF failed to met its initial burden. And even if it had met its initial burden, analysis of the record through the lens of *Scion* raises genuine issues of material fact as to whether plaintiff's assumed conduct of not reading the disputed documents constitutes a failure to act in good faith and in accordance with reasonable standards of fair dealing. This is not to say that plaintiff will ultimately prevail or that AVF cannot support its affirmative defense. It merely recognizes that, given the anemic state of discovery, summary disposition was premature.

Lastly, AVF contends that even if the trial court did err in granting summary disposition under MCR 2.116(C)(10), summary disposition under MCR 2.116(C)(8) was nevertheless appropriate because plaintiff failed to plead with sufficient specificity the existence of a prior agreement different from the one reduced to writing in the disputed documents. In support of its position, AVF relies on *Interactive Corp v Vivendi Universal, SA*, unpublished memorandum

opinion of the Delaware Court of Chancery, issued June 30, 2004 (CA No. 20260), wherein Vivendi, seeking reformation of its partnership agreement with Interactive, alleged in its complaint that the "Partnership Agreement was not intended to provide distributions to the preferred shareholders" and that to the extent that the Partnership Agreement did require such distributions, it "does not reflect the parties' prior agreement regarding that term." *Vivendi*, unpub op at 41. The chancery court found these allegations conclusory, and insufficient to support a reformation claim. *Id*. AVF asserts that the allegations in plaintiff's first amended complaint are no less conclusory than are Vivendi's and, therefore, should result in the same outcome, i.e., summary dismissal.

Under Delaware law, a motion to dismiss for failure to state a claim is brought under Court of Chancery Rule 12(b)(6). The court

> must assume the truthfulness of all well-pled allegations in the complaint and view those facts, and all reasonable inferences drawn from them, in a light most favorable to the plaintiff. The motion will be granted where it appears with "reasonable certainty" that the plaintiff could not prevail on any set of facts that can be inferred from the pleadings. [*Preston Hollow Capital LLC v Nuveen LLC*, 216 A3d 1, 9 (Del Ch, 2019).]

"[C]onclusory statements standing alone do not state a claim upon which relief can be granted." *Solomon v Pathe Communications Corp*, 672 A2d 35, 39 (Del, 1996).

We detect no error in the trial court's finding that plaintiff's first amended complaint sufficiently alleged the existence of a prior agreement. A prior understanding "need only be complete as to the issue involved. It need not constitute a complete contract in and of itself." *Cerberus*, 794 A2d at 1152. Plaintiff alleges in its first amended complaint that the parties "intended that only real property related to the AV Business would be transferred[,]" that this intent was reflected in the EPA, that the property to be transferred was listed by street address on Schedule 4.7(a), and that parcels 4 and 5 do not have a street address and were not related to the AV business. Plaintiff further alleged that the parties intended that plaintiff "would sell and convey Parcels 1-3 to Defendant AVF or its designee[,]" and that the parties "never intended to transfer Parcels 4-5 and Defendant AVF paid for only Parcels 1-3." Not only do we find no error in the trial court's characterization of these allegations as sufficiently specific to survive a motion for failure to state a claim, but assuming the truthfulness of the allegations and viewing them in the light most favorable to plaintiff, it does not appear "with 'reasonable certainty' that the plaintiff could not prevail on any set of facts that can be inferred from the pleadings." *Preston Hollow*, 216 A 3d at 9. Therefore, the trial court did not err in denying AVF's motion for summary disposition for failure to state a claim.

With regard to defendant Broadstone AVF Michigan, LLC, ("Broadstone"), the terms of the agreement between plaintiff and AVF allowed AVF to designate a buyer for the property transferred under the agreement, and AVF designated Broadstone. Thus, Broadstone benefitted from the trial court's grant of AVF's motion for summary disposition. Broadstone was not otherwise a party to the agreement, and as it acknowledges in its brief to this Court, it did not move for summary disposition or adopt, concur in, or offer oral argument regarding AVF's motion for summary disposition. Nevertheless, it contends that it is entitled to summary disposition under MCR 2.116(I)(2) (opposing party entitled to summary disposition). Broadstone's argument is

essentially the same as AVF's: namely, that the disputed deeds do not result from a mistake because the agreement between the parties unambiguously shows that the parties intended to transfer the parcels at issue. For the same reasons that we reverse the trial court's grant of summary disposition to AVF, we decline to grant Broadstone the relief it requests.

We affirm the trial court's denial of summary disposition for failure to state a claim, but for the reasons stated above, we reverse the trial court's order granting AVF's motion for summary disposition and remand for further proceedings consistent with this opinion.

Affirmed in part, reversed in part, and remanded for further proceedings. We do not retain jurisdiction.

/s/ Jonathan Tukel
/s/ Deborah A. Servitto
/s/ Jane M. Beckering